United States Court of
Appeals
Fifth Circuit
FILED
December 22, 2004
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41527
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIETTA LEZA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(2:03-CR-52-3)

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM: *

Defendant-Appellant Julietta Leza appeals her conviction for conspiracy to possess more than five kilograms of cocaine with the intent to distribute. She asserts that three statements admitted at trial did not fall under the co-conspirator exception to hearsay set forth in FED. R. EVID. 801(d)(2)(E), because there was insufficient evidence to establish Leza's participation in a conspiracy or to establish that the comments were made in furtherance of the conspiracy. The statements and the other testimony at trial establish

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

by a preponderance of the evidence that Leza participated in a conspiracy. See Bourjaily v United States, 483 U.S. 171, 181 (1987); Burton v. United States, 237 F.3d 490, 503 (5th Cir. 2000).

Leza did not object to the testimony of Rodney Mirabal with respect to a statement made to him by Felipe Alvarez (Felipe). We therefore review the introduction of the evidence for plain error only. United States v. Cantu, 167 F.3d 198, 204 (5th Cir. 1999). Leza has not established plain error in the introduction of Mirabal's statement.

Leza properly objected to the testimony of Diana Alvarez regarding statements made to her by Felipe. Even if it is assumed that the statements were not made in furtherance of the conspiracy, the introduction of the statements was harmless error. See United States v. Skipper, 74 F.3d 608, 612 (5th Cir. 1996).

Citing Blakely v. Washington, 124 S. Ct. 2531

(2004), and for the first time on appeal, Leza asserts that the district court erred in calculating the drug quantity for the base offense level and in denying her a minor role reduction. This argument is foreclosed by our decision in United States v. Pineiro, 377 F.3d 464, 473 (5th Cir.), petition for cert. filed (U.S. July 14, 2004). Consequently, the judgment of the district court is AFFIRMED.

U.S.Court of Appeals
F I L E D
FEB 28 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41527

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIETTA LEZA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas, Corpus Christi

ON PETITION FOR REHEARING

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge
REHG-2

/filed/ February 28, 2005

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Criminal Procedure 52--Harmless and Plain Error

(a) Harmless Error.

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error.

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

18 U.S.C. § 3553(a)

(a) Factors to be considered in imposing a sentence.-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed--
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for--
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
(i) issued by the Sentencing Commission pursuant to

section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
(5) any pertinent policy statement--
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
(6) the need to avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.